

SF File Number  
2060000

## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII

999 18th STREET - SUITE 500  
DENVER, COLORADO 80202-2466  
1262320 - R8 SDMS

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AUG 24 1994

Ref: 8RC

Mr. Robert M. Novotny  
Vice President-Operations  
ASARCO Incorporated  
180 Maiden Lane  
New York, NY 10038

ENVIRONMENTAL  
PROTECTION AGENCY

AUG 26 1994

MONTANA OFFICE

Dear Mr. Novotny:

I am writing in response to your August 11, 1994 letter regarding the United States Environmental Protection Agency's ("EPA's") issuance of a Notice of Violation ("NOV") to ASARCO Incorporated ("Asarco") for violations of the Clean Water Act, 33 U.S.C. §1251 et seq. EPA has considered Asarco's objections to the NOV and has determined that such objections do not warrant a change in EPA's course of action. For the reasons set forth below, EPA must deny Asarco's request to withdraw the NOV.

EPA sent the NOV, dated July 26, 1994, to the State of Montana because of the unauthorized discharge of pollutants at Asarco's East Helena facility. The NOV states that a discharge occurred into "an unlined pond located immediately adjacent to Prickly Pear Creek." The pollutants enter Prickly Pear Creek laterally through a hydrological connection between two surface water bodies - the Creek and Lower Lake. Contrary to the underlying assumption of Asarco's in-depth legal analysis, the NOV does not allege a discharge of pollutants into groundwater that then migrates into surface water through a hydrological connection between the groundwater and the surface water.

Prickly Pear Creek is located approximately 20-40 feet from Lower Lake and is approximately a foot lower than Lower Lake. The Superfund Remedial Investigation/Feasibility Study prepared by Asarco for the Process Ponds Operable Unit at the East Helena facility indicates that "the calculated flow [between Lower Lake and Prickly Pear Creek] is assumed to occur laterally." See, RI/FS, p. 3-21. The lateral hydrologic connection between Lower Lake and Prickly Pear Creek constitutes a discharge of pollutants into waters of the United States and is within the purview of Clean Water Act jurisdiction and EPA's authority to regulate. The Clean Water Act is intended to regulate any surface water that is affected by other sources of contaminated surface water.

Asarco argues that issuance of the NOV is inappropriate and unnecessary in light of Asarco's implementation of CERCLA remediation activities at the East Helena facility. The CERCLA activities are identified in EPA's Record of Decision ("ROD").

  
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The ROD contemplated that all use of Lower Lake would cease upon completion of construction of two 1 million gallon tanks; it did not contemplate that Asarco would continue to discharge process water to Lower Lake. The ROD and on-going CERCLA cleanup at the facility are neither appropriate nor adequate tools for dealing with Asarco's post-ROD discharges of water produced from on-going plant operations into Lower Lake.

There are significant distinctions between the role of EPA's CERCLA program and the role of EPA's Water Program. Nevertheless, EPA has closely coordinated activities of the two programs at the East Helena facility. The issue at hand is one of ensuring the regulation of discharges from plant operations that are separate and distinct from CERCLA cleanup actions. Contrary to Asarco's assertions that it has only recently been informed about Clean Water Act requirements, several years ago, after issuance of the ROD, EPA CERCLA staff identified the need to coordinate on-going plant operations that were outside the scope of the ROD with the Montana Water Quality Control Division. The CERCLA Remedial Project Manager for the East Helena site, raised the issue of Clean Water Act compliance with Asarco at several meetings and urged Asarco to coordinate with the State on this matter.

The focus of the NOV is to address the historical practice of treating and disposing wastewater from the on-going plant operations. To that end, EPA intends to gain a better understanding of how the East Helena facility operates by tasking a team of experts from the various EPA programs to perform a thorough inspection of the facility. This effort, scheduled to occur within the next several months, will be coordinated among EPA Water, CERCLA and RCRA staff.

EPA continues to assert that a National Pollutant Discharge Elimination System (NPDES) permit is needed and necessary. Based on statements made by your counsel to EPA in a meeting on May 27, 1994, it is our understanding that Asarco also agreed that a permit is necessary. EPA expects that Asarco will submit a permit application to the Montana Department of Health and Environmental Sciences in a timely manner.

If you have questions regarding this matter, please contact Max Dodson at (303) 293-1542, or Elyana Sutin at (303) 294-1054.

Sincerely,

A handwritten signature in dark ink, appearing to read "Wm Yellowtail". The signature is fluid and cursive, with the first name "Wm" and the last name "Yellowtail" clearly distinguishable.

William P. Yellowtail

cc:

Max Dodson  
John Wardell  
Thomas Speicher  
Elyana Sutin  
Suzanne Bohan  
Scott Brown  
Paul Montgomery  
Bruce Kent  
Larry Jensen  
Steve Pilcher